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No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict.

2. Whether due process forbids a state from punishing a defendant for its egregious and profitable misconduct on the basis of the actual and potential effects of that misconduct throughout the state.

3. Whether state law that requires appellate courts to review facts in the light most favorable to the party for whom the jury ruled violates due process of law.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Mayola Williams respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Oregon Supreme Court's decision in this case. Williams is also obliged to point out a potential defect in the petition with respect to the second and third of the Petitioner's Questions Presented. Pet. at i. The second question concerns whether a jury may consider the impact of defendant's misconduct and its public health consequences on others within the state. Petitioner conceded that the jury could consider that impact during the trial, offered a jury instruction to that effect, and may not now use the issue as a basis for appellate review. The third question, concerning whether the evidence should be viewed in a light favorable to the jury's verdict in the course of *de novo* review, was neither before the court below nor addressed by that court. *See* Pet. at 10a (listing issues Petitioner asked the Oregon Supreme Court to consider) & at 11a (indicating which issues the court addressed). It should not be considered now.

STATEMENT OF THE CASE

This Court remanded this matter to the Oregon Court of Appeals for reconsideration in light of the intervening decision in *State Farm v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801 (2003). In response, first the Oregon Court of Appeals and subsequently the Oregon Supreme Court scrupulously applied and carefully followed *State Farm*, with both courts holding that the jury's verdict was not grossly excessive but instead fully met constitutional requirements. The two courts arrived at the same conclusion: Petitioner's conduct was extraordinarily reprehensible and that the jury's verdict on punitive damages was entirely justified and fully consonant with the requirements of due process under the guidelines

established in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and further explained in *State Farm*.

Because it lost before those two courts, Petitioner Philip Morris now seeks this Court's review, pressing an issue it did not raise below, as well as one it conceded at trial, while advancing a self-serving and misleading rendition of the record and the decision below. Although Petitioner disagrees with the Oregon courts' application of the *BMW/State Farm* principles to the facts of this case, that disagreement provides no basis for further review by this Court, nor does it justify supervisory review of state court decision-making through the certiorari process.

In fact, Petitioner's expressed dissatisfaction with the Oregon courts' review of the record in this case necessarily makes its request to this Court either a "fact bound" inquiry or an assertion that any error "consists of a misapplication of a properly stated rule of law." Rule 10 of this Court's rules makes plain that petitions based on such claims of misapplication of the law or erroneous fact findings are "rarely granted." S. Ct. Rule 10. This petition does not comprise one of those rare instances where the matter is nonetheless certworthy. The petition should be denied.

After engaging in a thorough review of the record in this case, the Oregon courts each found that the Petitioner's conduct was at the extraordinarily high end of the reprehensibility spectrum and of a type that the state of Oregon deals with harshly. Petitioner's Questions Presented contain three complaints: (1) the trial court did not give a jury instruction proffered by Petitioner, even though it contained errors of law; (2) the punitive damages exceed a single-digit ratio when compared to the compensatory damages; and (3) the court below viewed the evidence in the record in the light most favorable to the verdict.

These are not grounds for certiorari. Granting the instant petition would encourage disappointed punitive damage defendants to seek certiorari as a matter of course with nothing more than a formulaic claim that a mathematical bright line should be employed. Such an approach would destroy the deterrent and retributive purpose of punitive damages by employing a one-size-fits-all approach that fails to fit the punishment to the crime.

That petitions for review of the punitive award could become standard operating procedure by defendants is not a time-limited concern. Petitions for certiorari raising issues of constitutional excessiveness are already regularly filed with this Court. *See, e.g., Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 26 Cal. Rptr. 3d 638 (Cal. App. 2 Dist. 2005), *cert. denied*, 126 S.Ct. 1567 (2006)(denying certiorari in a case involving $50 million in punitive damages). A defendant's dissatisfaction with a state court's application of *BMW* and *State Farm*, however, should not occasion a petition for certiorari. Sufficient safeguards exist in the state court systems without the need for yet another review of a verdict already confirmed through two levels of *de novo* review.

PHILIP MORRIS'S DEADLY FRAUDULENT SCHEME

When this case went to trial in 1999, Philip Morris was still engaged in an extensive and expensive campaign designed to deny the dangers of cigarette smoking, even though it knew better. Only after the jury's verdict did Petitioner begin to admit publicly and in later trials both the addictive qualities of cigarettes and their carcinogenic nature. The record shows that Philip Morris engaged in one of the longest running, most profitable, and deadliest frauds in history.

Jesse Williams died as a result of Philip Morris's lethal fraud. Tr. Vol. 9-B at 138, Vol. 11-B at 41; Ex. 159. By 1997, when Jesse Williams lost his battle with lung cancer, Philip Morris had known for at least 40 years that

cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. at 3a-7a; Tr. Vol. 12-B at 91-92, 9-A at 131-40, 11-A at 61-63; Ex. 50 at 1, 36 at 2. In an effort to maximize profit, Philip Morris either denied this knowledge outright, saying more research was needed, or disingenuously reassured its customers it would never jeopardize their health so as to create sufficient doubt to allow smokers to rationalize their behavior. Pet. at 38a-40a.

In 1952, *Reader's Digest* published an influential article on research findings that linked smoking with cancer. The article is credited with causing cigarette sales to fall for the first time in the twentieth century. Tr. Vol. 7-A at 109-10. To counter this trend, Philip Morris designed an elaborate public relations campaign to ensure that people continued to buy and smoke cigarettes. Pet. at 3a-4a. This campaign began with the publication of "A Frank Statement to Cigarette Smokers." The "Frank Statement," which first appeared as an advertisement in major newspapers throughout the United States, including Oregon, stated that Petitioner's cigarettes were not injurious to health and that smokers' health was a "basic responsibility, paramount to every other concern in our business." Pet. at 3a-4a; Ex. 7 at 2. The "Frank Statement" also announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco and health." Pet. at 3a-4a.

This document was the beginning of Philip Morris's "common front" approach to creating doubt about the relationship between smoking and disease. Over the next decade, similar statements were broadcast to the public including that Philip Morris would "stop business tomorrow" if it thought that its product was harming smokers, and that "there was no connection" between smoking and disease or Philip Morris "wouldn't be in the

business." Pet. at 4a; Ex. 10, 11, 47, 161 at 1. When it made these statements, Philip Morris knew that "[s]moking causes lung cancer." Ex. 28 at 2, 32 at 1, Tr. Vol. 11-A at 62-63.

In response to the 1964 Surgeon General's Report, finding that smoking contributed substantially to mortality rates from lung cancer and other diseases, a Philip Morris vice president wrote that "we must, on a future basis, give smokers a psychological crutch and self-rationale to continue smoking." Pet. at 4a. Thereafter, the self-described "brilliantly conceived and executed" public relations strategy to "defend itself" in "litigation, politics, and public opinion" was altered from the "vigorous denial" approach to a "counter propaganda" plan. Ex. 80 at 7-8, 83 at 1. In short, the new plan was designed to suggest "ready-made credible alternatives" to the idea that smoking causes disease, while still insisting that there was "no proof that smoking causes cancer." Pet. at 4a. Philip Morris maintained this position as the industry leader throughout the 1970s, 1980s, and 1990s. *Id.* This campaign of misinformation, exactly as intended, provided tobacco-addicted smokers with a basis to continue to use cigarettes. Ex. 50, 161 at 1, 175.

The "counter propaganda" was not limited to the relationship between smoking and health. Ex. 36 at 2, 106. Publicly, Philip Morris also continued to deny that the nicotine in cigarettes was addictive. Ex. 148. Privately, Philip Morris concluded that "no other rationale is adequate to sustain the habit [of smoking] in the absence of nicotine." Ex. 72 at 2. The research director of Philip Morris described the company's understanding best by stating that "I think the thing that we sell most is nicotine." Ex. 109 at 1. Yet, the addictive properties of nicotine remained secret because corporate decisionmakers had concluded that "the entire matter of addiction is the most potent weapon a prosecuting attorney can have in the lung cancer/cigarette debate. We

can't defend continued smoking as 'free choice' if the person was 'addicted.'" Ex. 110 at 2.

To increase cigarette sales, Philip Morris dedicated years of study to the role of nicotine addiction in smoking. Ex. 39, 44 at 1, 53 at 1, 58 at 1, 91 at 2. Specifically, Philip Morris used data that suggested that "a smoker [has] daily intake quotas for tar and/or nicotine" to its financial advantage by introducing lower tar and nicotine cigarettes. Ex. 57 at 1, 134 at 1, 139 at 1. As smokers switched to lower tar and nicotine cigarettes, Philip Morris correctly predicted the smokers would increase their cigarette consumption to maintain their nicotine intake. Ex. 57 at 1.

Philip Morris's long standing fraudulent scheme was very successful. The company shipped 235 billion cigarettes and made a net profit of $1.6 billion the year that Jesse Williams died. Pet. at 74a; Tr. Vol. 14-A at 49-50, 55. In 1996, when Jesse Williams was diagnosed with lung cancer, Philip Morris made a net profit of $2 billion. *Id.* at 58. At the time of Jesse Williams's posthumous trial, Philip Morris had a net worth of more than $17 billion and a 51 percent domestic cigarette market share. Pet. at 74a; Tr. Vol. 14-A at 57.

It was established to the jury's and Oregon courts' satisfaction that Jesse Williams received and believed Philip Morris's false statements made on television and through the print media. Tr. Vol. 12-B at 49-50, 80. He told his wife that tobacco companies would not sell a product that caused cancer "because a tobacco company just would not do that." Tr. Vol. 12-B at 41. Moreover, as recently as 1994, Philip Morris published advertisements called "Facts You Should Know" in local newspapers, including the Portland *Oregonian*. Ex. 148. Among other things, the advertisements claimed that nicotine was not addictive. *Id.* Mr. Williams read the *Oregonian* and was generally a well-read person who liked to keep up with current events through magazines and newspapers. Tr. Vol. 15-B at 130, 147-48, 15-A at 55.

Mr. Williams tried a number of times to stop smoking, but he was "highly addicted," and his efforts were unsuccessful. Tr. Vol. 4-B at 20, 12-B at 46-47, 51-52, 71-73. After being diagnosed with lung cancer caused by cigarettes, Jesse Williams told his wife that he had been betrayed by the "cigarette people" who had "deceived" him, and that "they were lying all the time." Tr. Vol. 12-B at 85. After his death, his widow filed this lawsuit to "make a difference for people that had been denied the evidence that cigarettes could harm them" and "let other people know that they were being deceived." *Id.* at 93-94. The evidence led to a finding that Philip Morris purposefully misrepresented the facts in order to deceive smokers. Pet. at 3a. Philip Morris acknowledged that Jesse Williams relied upon its messages when, in lower court briefing, it argued that the record contained evidence that he "clung to Philip Morris' few public statements related to smoking and cancer." Defendant's Reply Br. in Or. Court of Appeals (*Williams I*), at 13.

During the 1999 trial, the court told counsel that the jury would be instructed that, pursuant to the prayer for relief, punitive damages would be limited to $100 million. Defense counsel told the court that this was "okay." Tr. Vol. 22-C at 87, 25 at 64. Philip Morris sought a jury instruction that stated, among other things, that the punitive damage award must bear a reasonable relationship to the compensatory damages and that "you may consider the extent of harm suffered by others" in determining punitive damages. Pet. at 14; Defendant's Reply and Cross Responding Br. in Or. Court of Appeals, at 37. Much of this proposed instruction was contrary to Oregon state law, and the trial judge refused the instruction. Pet. at 17a-18a. The jury was then instructed that only in-state conduct could be punished when assessing punitive damages, and the judge explicitly went through the six relevant Oregon punitive damage factors to consider under Or. Rev. Stat. § 30.925. Tr. Vol. 25 at 49-51. The trial judge also instructed the jury to focus only on whether Philip Morris's fraudulent conduct that

resulted in Jesse Williams's death was likely to cause serious harm in Oregon. Tr. Vol. 25 at 50-51.[1]

On March 30, 1999, the jury rendered its verdict. J. at 1. The jury found Philip Morris liable for fraud and awarded $21,485.80 in economic and $800,000 in non-economic damages.[2] The jury specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damage to plaintiff." J. at 3-4. The jury then awarded $79.5 million in punitive damages. *Id.*

The jury also found Philip Morris liable on a claim of negligence but also found Jesse Williams was 50 percent negligent. The jury declined to award punitive damages on the negligence count.

The jury's punitive damages award amounted to two and one-half weeks' profit for defendant in the year in which Williams died. Tr. Vol. 14-A at 55. Upon Philip Morris's Motion for a Reduction of Punitive Damages, the trial court found the punitive damage award to be within the range that a rational juror could assess "based upon

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[1] Philip Morris purports to quote Plaintiff's counsel during oral argument to the effect that the jury was urged to punish Philip Morris for harms to other unidentified people. The Petition's quotation on this is actually an amalgam of two separate statements from two different lawyers in reverse order and utterly out of context. Both counsel's statements urged the jury to consider the impact of Philip Morris's fraudulent campaign on other Oregonians and the amount of money that it would take to deter them from continuing this highly profitable misconduct. The opinions below emphasize that the punitive damages were awarded for harm to Oregonians only. Pet. at 7a, 20a-21a, 23a, 33a, 41a, 66a, 69a, and 72a-73a.

[2] A statutory cap on noneconomic damages reduced the jury's $821,485 compensatory verdict to $521,485. Pet. at 3. The reduction was based on Or. Rev. Stat. § 18.560(1).

the record as a whole and applying Oregon, common law and statutory factors" but still reduced it to $32 million in accordance with perceived "federal standards." Pet. at 3; Appellant's Br. in Or. Court of Appeals (*Williams I*), at 39-40.

Both parties appealed. The Court of Appeals upheld the finding of fraud. It held that the evidence would permit the jury to find that Philip Morris affirmatively misrepresented that smoking was not harmful to a person's health and that it intended Mr. Williams and other Oregon smokers to rely on this misrepresentation. *Williams v. Philip Morris Inc.*, 48 P.3d 824, 833 (Or. Ct. App. 2002) (*Williams I*). Further, the court found that a number of Mr. Williams's statements constituted direct evidence that Mr. Williams received and relied upon defendant's misrepresentations. *Id.* at 834.

The court reviewed the Petitioner's excessiveness argument *de novo* under both the applicable state statutory criteria, Or. Rev. Stat. § 30.925, and the *BMW* guideposts. *Id.* at 836, 838-42. Among other things, the Court found Petitioner's behavior to be particularly egregious in this case because Philip Morris sought to make large amounts of money by engaging in a fraudulent scheme, over a period of four decades, to induce people to use or continue to smoke cigarettes despite the fact that smoking would cause serious illness or death in a significant percentage of people. *Id.* at 838-40. When addressing the ratio between punitive and compensatory damages, the court found that the ratio to potential harm was not one that "raises our judicial eyebrows" and amounted "to little more than two and a half weeks' profit." *Id.* at 841. Petitioner then sought further review in the Oregon Supreme Court, which denied the petition. 61 P.3d 938 (2002).

Upon remand from this Court in light of *State Farm*, the Court of Appeals readopted its previous opinion in all respects that were not superseded. Pet. at

36a. The court also found the jury award to be consistent with the *BMW* guideposts that this Court had reiterated in *State Farm*. Pet. at 67a-75a. In fact, the Court of Appeals found it "difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public." Pet. at 73a. The Oregon Supreme Court affirmed, addressing only two issues: whether Philip Morris's proffered instruction was erroneously rejected and whether the punitive damages were unconstitutionally excessive. Pet. at 10a-11a. On the first issue, it determined that the proffered instruction was contrary to state law and properly rejected by the trial court. On the second issue, the Oregon Supreme Court concluded

> Philip Morris . . . engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number in that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, . . .

Pet. at 33a.

REASONS FOR DENYING THE PETITION

I. THE OREGON SUPREME COURT FAITHFULLY FOLLOWED THIS COURT'S DECISION IN *STATE FARM*

A. Reprehensibility Remains the Most Important Indicium of Whether a Punitive Damage Award is Unconstitutionally Excessive

1. Petitioner misstates the importance of the reprehensibility guidepost

Petitioner focuses nearly exclusive attention on the second guidepost from *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996): "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." It treats that guidepost as if it were the conclusive and overriding test of excessiveness, subjugating the other guideposts to a limited and lesser role defined by the "ratio" guidepost. Pet. at i (question presented). In fact, Philip Morris misstates this Court's holdings by arguing that reprehensibility merely establishes where on the continuum of single-digit ratios the punitive damages should be pegged. *See* Pet. at 7 (arguing that this Court "has established a range of constitutionally permissible ratios and suggested that the degree of reprehensibility (and the amount of compensatory damages) will determine where within that range the constitutional cut-off falls in a particular case.") & 9 ("the degree of reprehensibility, among other factors, helps the court to determine which single-digit multiplier is appropriate.").

This Court confirmed in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), that "[t]he most important indicium *of the reasonableness of a punitive damages award* is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419, quoting *BMW*, 517 U.S. at 575 (emphasis supplied). *See also Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003) (footnote omitted) (reprehensibility "receives the heaviest weight"). Petitioner's approach fails to give reprehensibility its appropriate weight.

Courts are to "determine the reprehensibility of a defendant['s misconduct] by considering" five factors:

> [W]hether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 419, citing *BMW*, 517 U.S. at 576-77.

Each of these aggravating factors supports the substantial award of punitive damages in this case. In fact, the evidence in this case points to a record of reprehensibility that is unique in American history. Philip Morris is a company worth $17 billion, built on sales of cigarettes, which in 1997 alone brought in profits of $1.6 billion.[3] Amazingly, Petitioner reaped these profits from selling a product that it knew would kill many of its own customers—not through misadventure or accident, but, when used as defendant *intended* them to be used. The crux of this case is Petitioner's purposeful misrepresentation of this knowledge for economic gain.

The numbers are staggering. Philip Morris cigarettes kill an estimated 200,000 Americans each year.[4] No other product sold in the U.S. kills as many as

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[3] The company shipped 235 billion cigarettes and made a net profit of $1,607,000,000 in 1997, the year that Jesse Williams died. Tr. Vol. 14-A at 49-50, 55.

[4] The evidence was that cigarette smoking kills more than 400,000 Americans each year. Tr. Vol. 9-B at 138, Vol. 11-B at 41. Evidence showed that Philip Morris has approximately 51% of the domestic cigarette market. Tr. Vol. 14-A at 57.

one in ten of its regular users.[5] How—especially in our increasingly health-conscious society—has Philip Morris managed to keep its customers smoking? One strategy, which lies at the heart of plaintiff's evidence in this case, has been a deadly, decades-long, fraudulent scheme to misrepresent the scientific facts about the risks of smoking and to exploit the addictive nature of nicotine. Starting in the early 1950s, as evidence linking cigarettes and cancer began to depress tobacco company profits, Petitioner and others in the industry devised a joint scheme to take advantage of the vulnerability of the class of addicted consumers they had created. They issued misrepresentations through the popular press well into the 1990s asserting that the link between smoking and disease is a matter of dispute among scientists and an open question that required further study. Petitioner knew not only that these statements aimed at smokers like Jesse Williams were false, but also that addicted smokers like Jesse Williams would cling to such statements and reports to rationalize their smoking and avoid the difficult ordeal of quitting, which their addictions made even more arduous.

As the Oregon Court of Appeals summarized the evidence in the record, Philip Morris "sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death." *Williams I*, 48 P.3d at 840.

2. *Petitioner does not dispute the strong state interest in punishing and deterring Philip Morris's life-threatening misconduct*

In its effort to portray the Oregon court's opinion as in conflict with *State Farm*, Petitioner ignores this

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[5] The jury, however, only considered the impact on smokers in Oregon, as it was instructed by the trial court.

Court's admonition that an award can only be fairly characterized as "grossly excessive" by viewing it in relation to the State's "legitimate interests in punishing unlawful conduct and deterring its repetition." *State Farm*, 538 U.S. at 416, quoting *BMW*, 517 U.S. at 568. "For that reason, the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *Id.* There can be no disagreement regarding the paramount and legitimate interest Oregon has in punishing and deterring fraudulent misrepresentations, motivated by financial gain, with respect to consumer products that place its consumers at risk of serious injury or death for profit.

3. The fact that Philip Morris's misconduct "caused a significant number of deaths" was relevant to reprehensibility

Petitioner makes no assignment of error regarding the lower court's legal standard of reprehensibility, its application of the five factors outlined in *State Farm*, or the court's conclusion that Philip Morris's misconduct was highly reprehensible. Instead, Petitioner focuses almost entirely on what it characterizes as the claims of non-parties. Pet. at 14-22. The record evidence established that defendant's products "caused a significant number of deaths each year in Oregon." Pet. at 8a.

Such an acknowledgment by the supreme court and court of appeals does not run afoul of this Court's holding in *State Farm*, despite Petitioner's assertion to the contrary. Pet. at 16-19. *State Farm* condemned consideration of a "defendant's *dissimilar* acts, independent from the acts upon which liability was premised, [and which] may not serve as the basis for punitive damages." 538 U.S. at 422 (emphasis added). By contrast, the death of other smokers in Oregon was the consequence of the very same fraudulent scheme alleged

by plaintiff. The *State Farm* Court made clear that "conduct by [defendant] *similar* to that which harmed [plaintiffs]" is relevant to reprehensibility. *Id.* at 424 (emphasis added). Indeed, this Court has consistently stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance," *Id.* at 423, quoting *BMW*, 517 U.S. at 577. This Court added that "courts should look to 'the existence and frequency of similar past conduct'" in evaluating reprehensibility. *Id.*, quoting *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 462 n.28 (1993) and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991).

The Oregon courts properly considered the harm to other smokers resulting from Philip Morris's misrepresentations to show what this Court subsequently called the degree of a defendant's "indifference to or a reckless disregard of the health or safety of others." 538 U.S. at 419. Indeed, the *State Farm* Court added that even out-of-state conduct, if similar to that directed at plaintiffs, would also be relevant to reprehensibility. *Id.* at 422.

Finally, there is no merit to Petitioner's argument that permitting punishment for harms to nonparties conflicts with *State Farm* and constitutes a recipe for multiple punishments. Pet. at 15. First, as detailed above, this Court in *State Farm* made clear that such evidence of repeated or similar misconduct resulting in harm to others *is relevant* to reprehensibility and thus to the reasonableness of punishment. 538 U.S. at 423. Second, Oregon, by statute, Or. Rev. Stat. § 30.925(2)(g), protects defendants from multiple punitive damage awards for the same course of conduct. *See also* Pet. at 66a-67a.

In conclusion, the harm caused by Petitioner "was physical as opposed to economic," "evinced . . . a reckless disregard of the health or safety of others," targeted "financial[ly] vulnerabl[e]" people, "involved repeated actions" over the course of four decades, and was the

product of "trickery, or deceit." *Compare State Farm*, 538 U.S. at 419. All of the potential elements this Court identified as establishing high reprehensibility were present in the extreme.

B. The Oregon Court's Application of the "Ratio" Guidepost Does Not Conflict with *State Farm*

1. State Farm does not hold that punitive damages must conform to a single-digit ratio

Philip Morris reads this Court's opinion in *State Farm* as if it established a categorical limitation on the size of a punitive damage award. Pet. at 7. Yet, this Court could not have been more plainspoken in rejecting that approach to punitive damages. Contrary to Petitioner's assertion that awards must fall within a single-digit ratio unless the compensatory damages are so small as to make that number inconsequential, Pet. at 8, this Court reiterated in *State Farm:*

> '[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award.' We decline again to impose a bright-line ratio.

538 U.S. at 424-25, quoting *BMW*, 517 U.S. at 582 (emphasis in original, citation omitted).

As if that were not clear enough, *State Farm* emphasized that "there are no rigid benchmarks that a punitive damages award may not surpass." *Id.* at 425. This Court stressed that its referenced ratios *"are not binding." Id.* (emphasis added).

Responding to an argument like Petitioner's here that *State Farm* established an immutable ratio, Judge Richard Posner, speaking for the U.S. Court of Appeals for the Seventh Circuit, wrote: "The Supreme Court did

not, however, lay down a 4-to-1 or single-digit ratio rule . . . and it would be unreasonable to do so." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003).

Nor do the decisions Petitioner cites as creating conflicts on this issue actually stand in conflict. Rather than hold that 9:1 is the constitutional maximum, Pet. at 14, *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005) examined, with approval, earlier Ninth Circuit punitive damage rulings, finding that a variety of awards, ranging from 2.6:1 to 28:1 all met constitutional muster. *Id.* at 954-57. It then found, in the case before it involving the difficult assessment of punitive damages where there were multiple plaintiffs and multiple defendants, that circumstances justified a substantial punitive damages award and that a 9:1 ratio did not offend "constitutional sensibilities." *Id.* at 963. No mandatory single-digit ratio requirement was established by the Ninth Circuit.

Similarly, in each and every one of Petitioner's claimed conflicts among the lower courts, *see* Pet. at 12-13 n.5, the decisions engage in a fact-intensive constitutional inquiry in order to fit the punitive award to the misconduct. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 602 (6th Cir. 2006)(finding Chrysler's conduct not to be "sufficiently indifferent or reckless to support a $3 million award"); *Conseco Fin. Servicing Corp. v. North Am. Mortgage Co.*, 381 F.3d 811, 825 (8th Cir. 2004)(large compensatory damage award "in the 'absence of extremely reprehensible conduct against the plaintiff or some special circumstance'" could not support a large exemplary award)(citation omitted); *Bach v. First Union Nat'l Bank*, 149 Fed. Appx. 354, 366 (6th Cir. 2005)(finding punitive damages excessive where large compensatory award was accompanied by "only one of the five reprehensibility factors"); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004)(finding punitive damages excessive because the award "reflects

bias and a focus on irrelevant considerations," the compensatory award was substantial, and punitive verdict was many times defendant's net worth). None of these cases establishes the mathematical bright line that Petitioner claims.

High ratios between actual and punitive damages may be justified by the facts of a case. This Court has recognized the fact-intensive nature of this inquiry. In *State Farm*, it emphasized that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425 (suggesting that a 500-to-one ratio could also be justified under the proper circumstances).

It is worth noting that the ultimate result in *State Farm*, whose misconduct merely "merit[ed] no praise," *id.* at 419, was $9 million punitive damage award and a $1 million compensatory damage award. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004). Under Petitioner's proposed regime, Philip Morris's exponentially more egregious and reprehensible conduct would justify a smaller award than the "minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them." *State Farm*, 538 U.S. at 426. Such a result, considering the absence of aggravating factors in *State Farm* and the overwhelming presence of them here, would be inconsistent with this Court's punitive damage mandates in which the punishment should fit the misconduct.

2. *State Farm does not limit double-digit ratios to cases involving small compensatory damage awards*

Petitioner concedes only a solitary exception to the rigid single-digit ratio it wrongly claims is required: a case in which the compensatory award is so small that a single-digit multiple would amount to an inconsequential

penalty. Pet. at 8. This Court has not adopted so narrow a conception of when a larger award is merited. In fact, this Court articulated at least three non-exclusive examples of situations that merit higher punitive damage ratios:

1) Where "'a particularly egregious act has resulted in only a small amount of economic damages'", *State Farm*, 538 U.S. at 425 (citation omitted);

2) Where "'injury is hard to detect'", *id.* (citation omitted); and,

3) Where "the monetary value of noneconomic harm might have been difficult to determine", *id.* (citation omitted).

In addition to these explicit *State Farm*-endorsed justifications for punitive awards above the suggested single-digit ratio, other courts have found additional justifications for higher punitive awards, including the following relevant ones:

1) Where the probability of detection is very low, *see, e.g., Mathias*, 347 F.3d at 676;

2) Where the misconduct is potentially lucrative, *id.*; and,

3) Where wealth enables "the defendant to mount an extremely aggressive defense . . . [and] by doing so . . . make[s] litigating against it very costly, *id.* at 677.

State Farm left the door open even to triple-digit ratios when the facts and circumstances warrant it in the judgment of the jury and reviewing court. 538 U.S. at 425. In this case, the harm visited upon Jesse Williams was agonizing, ultimate, and irreplaceable. Yet, damages in wrongful death cases are difficult to set and "cannot be fully captured in money value." *Williams I*, 48 P.3d at 842. Under Oregon's wrongful death statute, as in most states, compensatory damages are based on the monetary losses of decedent's family, such as medical bills, burial

costs, and loss of the decedent's economic contribution to the family.[6] *See* Or. Rev. Stat. § 30.020. Damages for wrongful death are also artificially capped at $500,000, regardless of the amount the jury determines is necessary to compensate for any losses, regardless of the number of survivors. Or. Rev. Stat. § 18.560.

For these reasons, it is widely recognized that "[w]rongful death damages fail to compensate for the harm to decedent." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998). *See also* William Landes & Richard Posner, THE ECONOMIC STRUCTURE OF TORT LAW 187 (1987)(The measure of recoverable damages "results in a systematic underestimation of damages in wrongful-death cases."). Thus, the amount of compensatory damages awarded in wrongful death cases, such as this one, does not represent the extent of the harm caused by the defendant, but merely the monetary loss to the surviving family. Nor can it be said that the $500,000 in compensatory damages awarded in this case were "substantial" or "complete compensation" for the life that was taken.[7] *Compare State Farm*, 538 U.S. at 426 (finding $1 million to compensate plaintiff for 18 months of mental suffering substantial and complete compensation).

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[6] In Oregon, the surviving spouse and children are also entitled to noneconomic damages for loss of the "society, companionship and services of the decedent." Or. Rev. Stat. § 30.020(2)(d).

[7] Studies attempting to place a monetary value on the loss of life have arrived at estimates ranging from $3-$7 million. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations In Environmental and Safety Torts*, 87 GEO. L.J. 285, 314 (1998). "Court awards for compensatory damages after fatalities are typically well below that amount." *Id.*

Even if the Court were inclined to tie punitive damages more rigidly to compensatory damages, a wrongful death case such as this one is an especially poor vehicle to do so. Fewer than half the states permit punitive damages in wrongful death cases. 1 John J. Kircher & Christine M. Wiseman, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.10 (2d ed. 2000). As one commentator has noted, "[w]rongful death is an area of the law in which the measurement of loss in pecuniary terms presents intractable difficulties." Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982). A scholar who found a general correlation in awards between punitive and compensatory damages also discovered that "[t]he one exception to that pattern was in wrongful death cases." Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 79 IOWA L. REV. 1, 64 (1992).

Even scholars who advocate complete abolition of punitive damages acknowledge that wrongful death cases present an atypical situation of systematically low compensatory awards where punitive damages might be "needed to create adequate deterrence." Viscusi, *supra*, 87 GEO. L.J. at 334. For this reason, a wrongful death case presents a poor vehicle for this Court to establish a rigid ratio rule.

An additional difficulty is that, because compensatory wrongful death damages largely reflect the financial contribution of the decedent, awards for the wrongful death of a child or a nonworking spouse are comparatively low. Polinsky & Shavell, *supra*, 111 HARV. L. REV. at 941 n.229. Consequently, the constitutional presumption urged by Petitioner amounts to a presumption that, as a matter of law, the wrongdoer who kills a child or nonworking spouse is less deserving of punishment or deterrence than one who kills a healthy wage earner. The same rule of law would deem it more important to punish and deter misconduct that kills a

wealthy neurosurgeon rather than a semi-retired school janitor such as Jesse Williams. Tr. Vol. 12-B at 36-37. That such a rigid rule of inequality should be read into the Fourteenth Amendment is particularly inappropriate.

Beyond the issues posed by death's differences, this was a fraud that was difficult to detect and prove, as well as one in which Petitioner expended untold sums to hide and defend. Moreover, considering the huge profits pursued and obtained by Philip Morris in perpetuating this very successful fraud, it is not difficult to say that this punitive damage award was proportionate to the wrong committed.

II. PETITIONER'S PROFERRED JURY INSTRUCTION WAS PROPERLY REJECTED BY THE OREGON COURTS

A. State Farm Does Not Require a "Proportionality" Jury Instruction

Nothing in *State Farm* requires or suggests that a jury must be instructed as to the relationship between punitive and compensatory damages. In fact, the only mention of a mandated jury instruction in *State Farm* relates to advising the jury that "it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422. That instruction was given in this trial. Tr. Vol. 25 at 49-51. Of course, fraud is illegal in every state.

Even if such a "proportionality" instruction were advisable, the availability of *de novo* judicial review renders its absence harmless. Further, the instruction proffered by Philip Morris misstated the law and contradicted itself. The trial court had no obligation to adopt it and no obligation to rewrite it to correct its errors. The requested instruction said, in pertinent part:

> The size of any punishment should bear a reasonable relationship to the harm caused

> to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others *in determining what that reasonable relationship is,* you are not to punish defendant for the impact of its alleged misconduct on other persons . . .

Pet. at 14.

Plainly, the proposed instruction would have allowed the jury to consider harm to others in determining the reasonable relationship, or ratio of punitive to actual damages, which is precisely what Petitioner now says is improper. If it were improper, then giving the instruction would have been invited error. *See United States v. Deberry,* 430 F.3d 1294, 1302 (10th Cir. 2005)(explaining the invited-error doctrine). *See also Seaboard Air Line Ry. Co. v. Watson,* 287 U.S. 86, 89-90 (1932)(applying doctrine to proposed jury instructions).

Petitioner's proposed instruction was also erroneous as a matter of Oregon law. It would have told the jury not to be "influenced by the defendant's financial condition . . ." Defendants Requested Jury Instruction No. 34 at 2. Yet, a defendant's financial condition is explicitly made relevant to punitive damages by state statute, Or. Rev. Stat. 30.925(2)(f), and the *State Farm* decision clearly noted that, while wealth may not otherwise justify an unconstitutional punitive damage award, this "does not make its use unlawful or inappropriate." *State Farm,* 538 U.S. at 428, *quoting BMW,* 517 U.S. at 591 (Breyer, J., concurring). Moreover, a defendant's "financial condition" could well include its profitability, which, here, depended on its fraudulent scheme. It is entirely proper to assess punitive damages in an amount that disgorges ill-gained profits. *See, e.g., Mathias,* 347 F.3d at 676.

In Oregon, a trial court need not give an instruction that contains errors of law. *Simpson v. Sisters of Charity,* 284 Or. 547, 560 (1978). The trial court

correctly rejected Petitioner's proposed instruction, and the Oregon Supreme Court appropriately found no error in that ruling. Pet. at 18a.

B. Oregon May Consider the Impact on Defendant's Fraudulent Scheme on its Other Residents

The Oregon courts properly limited their consideration of harm to others to in-state victims of the same fraudulent conduct. This Court has never found that to be inappropriate. For example, in *BMW*, this Court reasoned that neither plaintiff Gore nor "any other BMW purchaser" was threatened with additional harm by defendant's misconduct. *BMW*, 517 U.S. at 582. This Court suggested a proper ratio of harm would be based not only on harm to the plaintiff but also on "the total damages of all 14 Alabama consumers who purchased repainted BMWs." *Id.* at 582 n.35. This Court described as "error-free" the portion of the jury's verdict that was based on the harm suffered by 14 victims of BMW's misconduct. 517 U.S. at 567 n.11.

Nothing in *State Farm* either explicitly or impliedly changes this aspect of *BMW*. The problem identified in *State Farm* was the state court's use of dissimilar, out-of-state conduct to justify the punitive damages award. *State Farm* said that a state does not have "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *State Farm*, 538 U.S. at 421. Far from holding that in-state harm to others could not be considered, *State Farm* found there was no evidence of such harm, stating that the plaintiff's inability to point to "testimony demonstrating harm to the people of Utah . . . indicates that the adverse effect on the state's general population was in fact minor." *State Farm*, 538 U.S. at 427.

Moreover, the Petitioner is wrong when it asserts that the Oregon Supreme Court's approach to harm to

others is in conflict with the California Supreme Court and the Eighth Circuit. Pet. at 19. In *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005), one of the cases Petitioner claims is in conflict, the California Supreme Court read *BMW* and *State Farm* to make

> clear that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's illegal or wrongful conduct toward others that was similar to the tortious conduct that injured the plaintiff or plaintiffs.

Id. at 90-91. *See also id.* at 93 ("Nothing the high court has said about due process review requires that California juries and courts ignore evidence of corporate policies and practices and evaluate the defendant's harm to the plaintiff in isolation.").

Similarly, the Eighth Circuit did not hold that misconduct toward a particular plaintiff must be considered in isolation, but instead merely warned against defining a course of misconduct at such a "high level of abstraction" that a plaintiff can use any prior bad acts as evidence of recidivism. *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004).

In this case, there was ample evidence that Philip Morris harmed many other Oregonians and did so on a continuous basis, rather than through a series of individually condemnable acts affecting distinct individuals separately. Moreover, Petitioner spent considerable time, effort, and money constructing and maintaining its fraudulent scheme in order to reap financial success. Philip Morris conceded in its motion to reduce punitive damages in the trial court that its fraudulent campaign "affected an undetermined (but surely relatively small) number of people such as Jesse Williams." Defendant's Reply Memorandum in Support of Motion for Reduction of Punitive Damages Award at 2,

lines 4-6. Philip Morris also conceded the relevance of harm to others and that others in Oregon were harmed when it argued, in the same pleading, that any award for harm in Oregon should be proportionately smaller than a punitive award in a California case simply because Oregon had a smaller population. *Id.* at 20. As the Court of Appeals recognized,

> there is evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims.

Pet. at 66a.

Philip Morris congratulated itself internally on its "brilliantly conceived and executed" fraudulent scheme. Ex. 83 at 1. There was more than enough evidence to allow the jury to determine that Petitioner's scheme succeeded with Oregonians other than Jesse Williams.[8]

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[8] There is little danger in Oregon of that consideration resulting in multiple punishments for the same conduct because, by statute, the state provides for consideration of past punitive damage awards precisely to prevent that possibility. Pet. at 66a-67a, citing Or. Rev. Stat. 30.925(2)(g).

III. THE OREGON COURTS' RESPECT FOR THE JURY VERDICT DOES NOT VIOLATE ITS OBLIGATION TO PROVIDE *DE NOVO* REVIEW

Petitioner argues here for the first time that the Oregon courts, in the course of a *de novo* review of this punitive damage award, should not have viewed the evidence in the light most favorable to the prevailing party. Pet. at 22a. This Court should not entertain this issue because Petitioner failed to preserve it below. If the Court considers it at all, the question presented clearly favors affirmance.

As this Court has made clear, appellate review of punitive damages is *de novo* with respect to the *trial court's* decision on the constitutionality of the punitive damage award. The appellate court does not reweigh the facts and review the jury's award itself *de novo*. *See Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.14 (2001). Punitive damage review decides whether a jury's verdict is grossly excessive, not whether it is the same verdict the court would have reached had it sat in the jury box.[9]

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[9] Petitioner's attempt to create a conflict with a few state courts on this issue should be rejected. Pet. at 23 & n.12. For example, in *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63 (Cal. 2005), the California Supreme Court did not hold, as Petitioner contends, that the facts should not be read in a favorable light to the plaintiff where there is no express factual finding. Instead, it found that the appellate court erred in presuming the size of the actual loss from the size of the punitive damage verdict. *Id.* at 70. That narrow ruling cannot support Petitioner's broad proposition. Nor do any of Petitioner's other citations amount to a conflict over viewing the facts favorably to the prevailing party. *See Wolf v. Wolf*, 690 N.W.2d 887, 894 (Iowa 2005)(engaging in *de novo* review only in assessing the application of the *BMW* guideposts); *Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *13-14 (Guam Nov. 16,

After this Court, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), required Oregon to provide judicial review of punitive damages for excessiveness, the Oregon Supreme Court held that such an award would "not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole." *Oberg v. Honda Motor Co.*, 888 P.2d 8, 10 (Or.), *cert. denied*, 517 U.S. 1219 (1996). This standard was subsequently codified by the Oregon legislature. Or. Rev. Stat. § 31.730. In adopting the "rational juror" standard, Oregon was not writing on a blank slate. In the federal *Oberg* decision, this Court found no defect in the use of "different verbal formulations" of the standard of review because:

> There may not be much practical difference between review that focuses on "passion and prejudice," "gross excessiveness," or whether the verdict was "against the great weight of the evidence." All these may be rough equivalents of the standard this Court articulated in *Jackson v. Virginia*, [443 U.S. 307, 324 (1979)](whether "*no rational trier of fact* could have" reached the same verdict).

512 U.S. at 432 n.10 (emphasis added). It is clear, then, that the "rational juror" standard and *BMW 's* "grossly excessive" standard are constitutionally compatible.

Federal courts utilize the "rational juror" standard in both criminal and civil matters. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Courts apply the standard whether reviewing asserted errors where proof must be beyond a reasonable doubt, clear and convincing, or by preponderance of the evidence. *Id.* Punitive

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2004)(same); *Aken v. Plains Elec. Generation & Transmission Co-Op, Inc.*, 49 P.3d 662, 668 (N.M. 2002)(same).

damages pose no unique problem that requires departure from this familiar and stringent standard.

Moreover, this Court has recognized that the Oregon Constitution accords the jury, even in punitive damage cases, authority to set damages and found that this status "compel[s] the treatment of punitive damages as covered [by the right to a jury trial]". *Cooper Indus.*, 532 U.S. at 437 n.10 (2001). Respect for state authority should also compel this Court to recognize Oregon's efforts to apply its own constitutionally compelled standard to supplement, but not replace this Court's punitive damage rulings. The Oregon courts fully engaged in the the *de novo* application of the *BMW* guideposts, as informed by *State Farm*. Pet. at 21a-33a, 67a-75a. *See also State v. Rogers*, 4 P.3d 1261, 1278 n.8 (Or. 2000)(appellate courts review legal questions "anew and without deference to the decisions of trial courts"). The *Cooper* decision does not require Oregon to abandon its respect for jury findings. Even under the lesser jury trial standard available under the Federal Constitution, this Court said:

> [N]othing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings [as are relevant to determining a punitive verdict.]

Cooper Indus., 532 U.S. at 439 n.12.

The rational juror rule satisfies due process and sufficiently assures, in combination with the *BMW* guideposts, that "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. *Haslip*, 499 U.S. at 20-21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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